SUBSTANCE AND PROCEDURE IN STATE FELA ACTIONS—THE CONVERSE OF THE ERIE PROBLEM?†

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The courts of the several states are obliged to take jurisdiction of actions brought under the Federal Employers' Liability Act[1] when their "ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity to those laws."[2] Since actions brought under the Act are essentially actions in common law negligence,[3] suitable state courts can invariably be found and their jurisdiction is commonly invoked. It has often been said that the state courts are free to follow their own procedure in such cases,[4] although of course they are bound to follow federal law in substantive matters.

In earlier times the courts employed the terms substance and procedure (and often still do) as if they had acquired an immutable meaning in the law. In recent years it has become increasingly clear that the courts should not and indeed do not apply standards of substance and procedure which are invariably the same in all legal contexts.[5] Particularly conspicuous has been the development in the federal district courts in consequence of *Erie R.R. v. Tompkins*[6] and its progeny—a development which has produced standards of substance and procedure radically different from those which have become familiar in the conflict of laws.[7] Two recent cases in the Supreme Court have induced speculation as to whether a development corresponding to *Erie* is taking place on the state court level in FELA actions and perhaps in all actions involving the assertion of

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[1] 35 Stat. 65 (1908), as amended, 45 U.S. C. Sec. 51-60 (1952).

[2] Second Employers' Liability Cases, 223 U.S. 1, 57 (1912).

[3] See New Orleans & N.E. R.R. v. Harris, 247 U.S. 367, 371 (1918). This is so even though the Act has removed certain common law defenses. See, *e.g.*, Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943).

[4] *E.g.*, Central Vermont Ry. v. White, 238 U.S. 507, 511 (1915); Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916); Dickenson v. Stiles, 246 U.S. 631 (1918).

[5] See Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1923); Tunks, *Categorization and Federalism: "Substance and Procedure" after Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271 (1939). Thus the considerations that may save a retroactive criminal statute from invalidation on ex post facto grounds, on the theory that it deals only with "procedural" matters, are not necessarily the same as those which determine how far foreign law shall be applied in order to give effect to a foreign contract. See Cook, *supra*, at 341-42.

[6] 304 U.S. 64 (1938).

[7] Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 71-72 (1955).

federally-created rights. In *Brown v. Western R.R. of Alabama*[8] a state court was reversed, apparently for the reason that it required excessive particularity in the pleading of an FELA action, although the circumstances were such that a similarly strict pleading requirement in respect to a cause of action arising in another state probably would have been sustained. In *Dice v. Akron, C. & Y. R.R.*[9] a state court was reversed for not granting a jury trial on an issue of fraud in an FELA case, although, again, similar action in respect to a cause of action arising in another state probably would have been sustained. As will be seen, these two cases are only recent manifestations of a development which in fact has been taking place for a considerable time.

In the conflict of laws the need to draw a distinction between substance and procedure is inevitable. While there is universal acceptance of the principle that a controversy should be resolved in accordance with the law of the foreign locus,[10] the belief is also universal that it is neither feasible nor desirable for the courts of the forum to attempt to resolve the controversy in a setting in which the foreign law is followed to the last detail of judicial administration.[11] Hence a line needs to be drawn between the "procedural" area in which the forum applies its own law and the "substantive" area in which it applies the foreign law, and this line is differently drawn in different systems of conflict of laws.[11a] It is manifest that such a line also needs to be drawn when state-created rights are asserted in a federal court or federally-created rights are asserted in a state court.

In the conflict of laws (and this term is used here with reference to the problems of applying law which is foreign in a territorial sense), the American development of the substance-procedure dichotomy has been dominated by a formula which classifies as substantive the rules prescribing the legal consequences of established facts, and as procedural the rules prescribing how and under what circumstances the facts are to be established.[12] Hence it is that such matters as burden of proof, presumptions, and sometimes even statutes of frauds, are deemed procedural.[13] Owing to this method of classification, the system sometimes permits the resolution of a controversy in a way diametrically opposed to the way

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[8] 338 U.S. 294 (1949). See, *e.g.*, 2 STAN. L. REV. 594 (1950); 2 ALA. L. REV. 366 (1953); 11 U. PITT. L. REV. 492 (1950).

[9] 342 U.S. 359 (1952). See, *e.g.*, 31 TEXAS L. REV. 218 (1952); 4 SYRACUSE L. REV. 171 (1952); 20 GEO. WASH. L. REV. 788 (1952); U. ILL. L. FORUM 297 (1952); 37 CORNELL L. Q. 799 (1952); 30 CHI.-KENT L. REV. 364 (1952).

[10] A more apt term less commonly employed would be the lex causae.

[11] See Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); RESTATEMENT, CONFLICT OF LAWS, c. 12, Introductory Note (1934).

[11a] *E.g.*, 2 RABEL, CONFLICT OF LAWS 276-86 (1947).

[12] See STUMBERG, CONFLICT OF LAWS 134-35 (2d ed. 1951), for a statement of the classic rule and a warning against its misuse.

[13] *Id.* at 137-47.

it would have been resolved in the foreign locus, or permits the probable outcome of the controversy to be affected by subjecting one or the other of the parties to a substantial burden or bestowing upon him a substantial advantage—and this without the justification that such a course is dictated by significant considerations of local convenience or local policy.[14].

The system is not static. However, such progress as is being made toward a classification of substance and procedure which tends to give more realistic effect to rights claimed under foreign law is necessarily erratic, since the forty-eight states are apparently free to evolve independent conflict rules without interference from the Supreme Court save in particularly aberrational cases.[15] The Full Faith and Credit Clause requires adherence to the statutes of another state only when they are "substantive,"[16] and even then does not require adherence in the face of a contrary local policy supported by local contacts with the transaction.[17] If the foreign law involved is non-statutory, it needs to be followed, in general, only if the failure to do so would be so irrational or unfair as to be a denial of due process.[18] Even where the forum has no contact with the controversy save as forum, an unusual classification of a particular rule as procedural is apparently entitled to respect as a "local policy,"[19] except in an extreme case.[20]

In the post-*Erie* period there has been a striking departure from the substance-procedure dichotomy of the conflict of laws in cases in the federal courts involving the assertion of state-created rights. Here the policy has been established that, at least when jurisdiction is founded on diversity of citizenship, the federal district courts shall strive for an outcome of the litigation identical with the probable outcome in the courts of the state where they sit.[21] The policy is one which puts a higher value upon conformity between federal and state courts sitting within a

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[14] Students of the conflict of laws have been sharply critical of this practice. See authorities collected in Hill, *supra* note 7, at 72 n. 31.

[15] See Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953).

[16] *Id.* at 593.

[17] *E.g.*, Atlantic Packers Assoc. v. Industrial Acc. Com. of Calif., 294 U.S. 532 (1935).

[18] *E.g.*, Home Ins. Co. v. Dick, 281 U.S. 397 (1930). *Cf.* GOODRICH, CONFLICT OF LAWS 31-32 (3d ed. 1949).

[19] See Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487, 496, 498 (1941). In this case the trial was in Delaware, which was also the place where one of the parties had incorporated. It is clear from the opinion, however, that the Court was concerned only with the regard due to the "policy" of the forum qua forum. The assumed posture of Delaware law concerning damages, which Judge Goodrich had thought to be contrary to the "better view," 115 F. 2d 268, 275 (3d Cir. 1940), but which the Supreme Court held to represent a valid local policy, was found upon later examination not to represent the Delaware law at all. See 125 F. 2d 820 (1942).

[20] John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936).

[21] See note 7 *supra*.

single state—and the consequent diminution of forum-shopping within such state—than it puts upon conformity with the probable outcome in the courts of the state where the cause of action arose. Whether or not this policy is an inexorable requirement of the Constitution, and the Supreme Court has recently intimated that it is,[22] the main thrust of the policy is clear enough, and the consequence has been a marked shift in the line between substance and procedure in the cases in which the policy is operative. A number of state rules which have traditionally been regarded as procedural in the conflict of laws sense must now be followed by the federal courts because they are "outcome-determinative:" *e.g.*, statute of limitations, burden of proof, and conflict of laws rules. A major reclassification is in full swing, and many crucial problems are still unresolved.[23]

Somewhat different considerations are involved when federally-created rights are enforced in the state courts. Litigation based upon a cause of action specifically created by Congress, as in the case of the FELA, or the Jones Act,[24] or the Securities Act of 1933,[25] represents only one aspect of the problem. A federally-created right may also be asserted as a defense in an action brought to enforce a state-created right, as where a contract is claimed to be void because in violation of the federal anti-trust laws.[26] Or state action may be attacked both on state and federal grounds, as where a state rate order is claimed to be invalid under the state and federal constitutions.[27] In all these instances the cardinal consideration is federal paramountcy; once the extent of the federal right is established there is no room for the operation of local policy, as contrasted with the scope afforded to local policy in the conflict of laws. Moreover, federal paramountcy extends as much to procedural as to substantive matters; if the federal purpose is clear, and if it is valid, there is no room for local procedural autonomy as there is in the conflict of laws, and this is true whether the federal purpose is evidenced by an express Congressional enactment of a "procedural" character or is reasonably inferable from the substantive federal right in issue. Combined with these factors there has been a judicial tendency, more evident in recent than in earlier times, to ascribe to Congress an intention that federally-created rights shall receive uniform enforcement throughout the land notwithstanding the concurrent responsibility of the state courts in such enforcement. These factors in combination led the Supreme Court, long before *Erie*, to impose upon the state courts rules which are in some respects.

[22] See Bernhardt v. Polygraphic Co. of America, 350 U. S. 198 (1956).

[23] See, *e.g.*, HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 659-60 (1935); Note, *State Trial Procedure and the Federal Courts: Evidence, Juries, and Directed Verdicts under the Erie Doctrine*, 66 HARV. L. REV. 1516 (1953).

[24] 41 Stat. 1007 (1920), 46 U.S. C. Sec. 688 (1952).

[25] 48 Stat. 74 (1933), as amended, 15 U.S.C. Sec. 77a (1952), as amended.

[26] See Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942).

[27] See Siler v. Louisville & N.R.R., 213 U.S. 175 (1909).

similar to the "outcome-determinative" rules which have become familiar since *Erie*, and this development has been particularly pronounced in FELA cases. However these two developments have in some respects been dissimilar, which can hardly be surprising in view of the different backgrounds from which they have emerged.[28] Recognition of the differences in these two developments can contribute to the better understanding of each.

The point by point analysis below is concerned chiefly with FELA cases, but this is because, as has been indicated, the evolution of the new substance-procedure dichotomy has been evidenced chiefly in such cases. Indeed there is ground for believing that some of the rules being evolved in the FELA cases should not at this time be extended to broader areas.

Burden of proof. The term burden of proof is indiscriminately employed by most courts to convey two different meanings. One of these is the burden of producing sufficient evidence to forestall a peremptory ruling for the opponent, such as a directed verdict or the sustaining of a demurrer to the evidence. This burden may shift during the course of the trial. Thus if the plaintiff discharges his burden of proving a prima facie case, the burden may shift to the defendant of producing evidence in denial, or in support of an affirmative defense; if the defendant proves an affirmative defense, the burden shifts to the plaintiff of producing evidence to overcome it. The other aspect of burden of proof is the burden of persuasion. If sufficient evidence has been produced on both sides to create a genuine issue of fact and to warrant submission of the case to the trier of the facts, which may or may not be a jury, the trier of the facts is supposed to make its determination in the light of the fact that the one party or the other bears the burden of persuasion. While the burden of producing evidence may shift from time to time during the course of the trial, the burden of persuasion is usually constant, devolving ordinarily upon the party who has sought to establish the affirmative side of any proposition.[29] In both senses, burden of proof is usually deemed procedural in the conflict of laws.[30] In both senses, it has been held by the Supreme Court to be outcome-determinative for *Erie* purposes.[31]

In *Central Vermont Ry. v. White*,[32] an FELA case instituted in a state court in Vermont, the contention was made that the jury should

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[28] In a brief reference to the problem in an earlier paper the writer stressed the similarities without taking account of the important differences. Hill, *op. cit. supra* note 7, at 107. Also see 2 STAN. L. REV. 594 (1950).

[29] 9 WIGMORE ON EVIDENCE 266 *et seq.* (3d ed. 1940); MCCORMICK ON EVIDENCE 635 *et seq.* (1954). The one who bears the burden of persuasion may also be said to bear the risk of non-persuasion. WIGMORE, *supra*, at 270-74, prefers the latter usage.

[30] STUMBERG, CONFLICT OF LAWS 137-41 (2d ed. 1951).

[31] Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939) (burden of producing evidence); Palmer v. Hoffman, 318 U.S. 109, 116-17 (1943) (burden of persuasion).

[32] 238 U.S. 507 (1915)

have been instructed, in accordance with Vermont practice, that the burden was on the plaintiff to prove freedom from contributory negligence. The traditional federal rule in negligence cases in this pre-*Erie* period was that the defendant had the burden of proving contributory negligence. Holding the Vermont rule inapplicable, the Supreme Court said that the question involved was not "a mere matter of procedure as to the time when and the order in which evidence should be submitted."[33] While the burden of persuasion was actually in issue in the case, the Court seems to have been thinking primarily in terms of the burden of producing evidence. Thus the reasoning of the Court was, in effect, that if one jurisdiction permits a plaintiff to recover if he establishes facts A and B, and another jurisdiction permits the plaintiff to recover only if he establishes facts A, B, and C, the rule which requires the plaintiff to establish (or which excuses him from establishing) fact C is not really procedural but "part of the very substance"[34] of his case. Such an analysis would be more apt where the existence or non-existence of fact C produces different legal consquences in the two jurisdictions. But, as Professor Morgan has pointed out,[35] the existence or non-existence of contributory negligence, once established, had precisely the same legal effect in the Vermont courts and in the federal courts. Thus the difference between the two jurisdictions was not over the peculiar combination of facts which entitled one party to judgment against the other, but over the conditions governing the establishment of such facts, and the Court was not persuasive as to the reasons which make some of such conditions more "substantive" than others.

The Court further observed that the federal rule placing upon the defendant the burden of proving contributory negligence was one that the federal courts had uniformly followed as a matter of "general law."[36] This does not mean that the rule involved had uniformly been regarded as "substantive." It was a common practice of the federal courts during the pre-*Erie* period to resort to "general law" on non-statutory questions irrespective of whether they were thought to be substantive or procedural;[37] indeed, in its opinion in the *Central Vermont Ry.* case the Court also used the term "general law" with respect to matters that it plainly regarded as procedural.[38] So here too one does not find a persuasive basis for the decision. But requiring the state court to follow a federal rule which had so obvious a bearing on the chances of recovery did make sense in terms of the uniform application of the federal statute,

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[33] *Id.* at 511-12.

[34] *Id.* at 512.

[35] Morgan, *Choice of Law Governing Proof,* 58 HARV. L. REV. 153, 187 n. 85 (1944).

[36] 238 U.S. 507 at 512.

[37] See Hill, *op. cit. supra note* 7, at 83-85.

[38] 238 U.S. 507 at 513, 515.

[39] *Id.* at 512.

and also in terms of a rationally inferable legislative intent, as the Court in fact indicated.[39]

In later cases arising under other federal statutes, the Court held that federal law determined the burden of producing evidence in support of an affirmative federal defense,[40] and more recently the Court established somewhat elaborate federal standards governing shifts in the burden of producing evidence where a negative defense is interposed to a federal claim.[41] The cases also reveal an increasing tendency to formulate "burden of proof" rules which accord with the basic purposes of the substantive federal policy being executed,[42] and which tend to give these policies a substantially "uniform application."[43] The cases usually talk of burden of proof without regard to which of its two components is involved, and there has been no broad declaration by the Supreme Court from which it could fairly be inferred that substantive effect is to be given to burden of proof in all its aspects. For that matter it is not yet clear that substantive effect is to be given to all aspects of burden of proof even in *Erie*-type cases.[44] In general the area is one where precedents on one level (federal enforcement of state law) may afford helpful analogies on the second (state enforcement of federal law), and vice versa. But regard must always be had for the fact that precedents on the state level may be peculiarly determined by considerations of specific Congressional intent or the effectuation of broad federal policy—considerations not similarly applicable in *Erie*-type situations.

Presumptions and Res Ipsa Loquitur: At the outset it may be noted

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[40] Hill v. Smith, 260 U.S. 592 (1923) (discharge in bankruptcy); *cf.* Garrett v. Moore-McCormick Co., 317 U.S. 239 (1942) (admiralty).

[41] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686-88 (1946). This suit, under the Fair Labor Standards Act, was brought in a federal district court rather than in a state court, but in view of the fact that the Supreme Court grounded its holding on what it deemed to be legislative intent there is every reason to believe that this aspect of the case is binding on the state courts, and a number of state courts have so construed it. Katchel v. Northern Engraving & Mfg. Co., 249 Wis. 583, 25 N.W. 2d 431 (1946); Sherman v. Coastal Cities Coach Co., 4 N.J. Super. 288, 66 A. 2d 894 (1949).

[42] Hill v. Smith, *supra* note 40; Garret v. Moore-McCormack Co., *supra* note 40. *Cf.* American Express Co. v. Levee, 263 U. S. 19 (1923).

[43] Garrett v. Moore-McCormack Co., *supra* note 40, at 244. *Cf.* Brady v. Southern Ry., 320 U.S. 476, 579 1943).

[44] Even in Central Vermont Ry. v. White, *supra* note 32, at 511-12, the Court, as has already been observed, seemed to assume that certain aspects of the burden of producing evidence were procedural. Professor McCormick thinks that the burden of producing evidence is of special significance for the outcome of a trial, but regards the burden of persuasion as a verbal formula which in most instances has little practical effect on juries. MCCORMICK ON EVIDENCE 685-86 (1954). His colleague Professor Stumberg seems to entertain generally contrary views. STUMBERG, CONFLICT OF LAWS 156-57 (2d ed. 1951). Compare 5 MOORE, FEDERAL PRACTICE, Para. 43.08 (2d ed. 1951) with Note, *supra* note 23, at 1518-19. Also see Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 185-93 (1944).

that if the operation of a so-called presumption is conclusive—if the acknowledged proof of fact A establishes the existence of fact B irrespective of the weight of evidence to the contrary—what is involved is not truly a presumption but a rule of substantive law which is usually given substantive effect in the conflict of laws.[45] Sometimes proof of fact A is deemed to constitute such strong evidence of the existence of fact B as to warrant peremptory disposition of this issue by the court unless the opposing party produces evidence in rebuttal from which the non-existence of fact B may reasonably be inferred. This is the only type of presumption recognized by some writers.[46] Sometimes the existence of fact A is deemed sufficiently strong evidence of the existence of fact B to warrant an inference that fact B exists but not such strong evidence that a contrary finding by the trier of facts would be wrong as a matter of law; upon proof of fact A the opposing party may, but need not, produce evidence concerning the non-existence of fact B—the burden of producing evidence does not shift. Some call this merely a permissive inference, and others call it a permissive presumption;[47] it will be given the latter designation for present purposes. Res ipsa loquitur, as given effect in most jurisdictions, is an example of such a permissive presumption.[48] In the case of the mandatory as distinct from the permissive presumption there is much disagreement as to the help it affords to the favored party once the other party produces rebutting evidence.[49] In general presumptions are treated as procedural in the conflict of laws.[50] In *Erie*-type situations the tendency is to treat them as outcome-determinative.[51]

Because the mandatory type of presumption is in large measure a provision governing the producing of evidence, it is not surprising that such rules were given substantive effect in FELA cases almost as soon as "burden of proof" was given substantive effect. The first of these cases, *New Orleans & N.E.R.R. v. Harris*,[52] involved a Mississippi statute which provided that proof of injury caused by a railroad should be prima facie evidence of negligence on the part of the railroad. On

[45] GOODRICH, CONFLICT OF LAWS 238 (3d ed. 1949).

[46] See Ray, *Presumptions and the Uniform Rules of Evidence*, 33 TEXAS L. REV. 588, 589 (1955).

[47] *Id.* at 589-90.

[48] Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 245-47 (1936).

[49] Ray, *op. cit. supra* note 46, at 591-96.

[50] BEALE, CONFLICT OF LAWS 1610-11 (1935).

[51] *Cf.* Sylvania v. Electric Products v. Barker, 228 F. 2d 842, 848-50 (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); Mark v. City of Ormond Beach, 113 F. Supp. 504 (S.D. Fla. 1953); United States v. Davis, 125 F. Supp. 696 (W.D. Ark. 1954); Herr v. Holohan, 131 F. Supp. 777, 779-80 (D. Md. 1955); Lobel v. American Airlines, Inc., 192 F. 2d 217, 219 (2d Cir. 1951), *cert. denied* 342 U.S. 945 (1952) (res ipsa loquitur); Hamilton v. Southern Ry., 162 F. 2d 884, 886 (4th Cir. 1947) (same).

[52] 247 U.S. 367 (1917).

the basis of this statute the trial court imposed upon the railroad the burden of producing evidence and the burden of persuasion as to non-negligence. The Supreme Court, citing *Central Vermont Ry. v. White*, held the Mississippi statute inapplicable on the ground that "burden of proof is a matter of substance and not subject to control by laws of the several States."[53] This case is typical of others in which state presumptions have been rejected in FELA cases on the theory that federal occupation of the field left no room for the operation of local rules which the Supreme Court thought to be more than merely "procedural."[54] Moreover the state courts have long deemed themselves bound to follow the federal standard of res ipsa loquitur in FELA cases, although until recently this standard was difficult of ascertainment.[55] It is now clear as a matter of federal law that res ipsa loquitur involves a presumption which is only permissive.[56] But it is obvious that this presumption may be of crucial aid to the plaintiff even if the defendant does not risk a peremptory ruling by his failure to produce rebutting evidence. Res ipsa loquitur is thus a clear example of an outcome-determinative rule, as the inferior federal courts have recognized in *Erie*-type cases.[56a] Of course where a federal statute creates a presumption as an incident to a federal cause of action[57] it should ordinarily be deemed applicable, unless a contrary intent appears, in the state courts as well as in the federal courts, and in these circumstances whether the presumption is or is not outcome-determinative is wholly irrelevant. In general the conclusions concerning burden of proof are applicable here: not all presumptions need necessarily

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[53] *Id.* at 372.

[54] *E.g.*, Smith v. Thompson, 349 Mo. 396, 161 S.W. 2d 232 (1942); *cf.* American Railway Exp. v. Levee, 263 U.S. 19 (1923). This is of course particularly true where the state presumption is conclusive, as where a state statute makes employment of a minor negligence per se. Chesapeake & Ohio Ry. v. Stapleton, 279 U.S. 587 (1929).

[55] See Connor v. Atchison T. & S.F. Ry., 189 Calif. 1, 207 P. 378 (1922); Louisville & N. R.R. v. Grant, 223 Ky. 39, 2 S.W. 2d 1063 (1928); Manning v. Chicago G.W. Ry., 135 Minn. 229, 160 N.W. 787 (1916). More recent cases have clarified the role of res ipsa loquitur in FELA actions. *See* Jesionowski v. Boston & Maine R.R., 329 U.S. 452 (1947); Johnson v. United States, 333 U.S. 46 (1948). Another federal presumption which is developing and which presumably is binding on the state courts is that the railroad employee is presumed to have exercised due care. This presumption has been used in recent years to help establish the proposition that the negligence of the railroad was the proximate cause of the accident in situations where there was no direct evidence as to how the accident occurred. See Tennant v. Peoria & Pekin Ry., 321 U.S. 29, 34 (1944); Stanford v. Pennsylvania R.R., 171 F. 2d 632, 635 (3d Cir. 1948).

[56] See Jesionowski v. Boston & Maine R.R., *supra* note 55, at 457.

[56a] Lobel v. American Airlines, Inc. *supra* note 51; Hamilton v. Southern Ry., *supra* note 51.

[57] *E.g.*, Section 15(b) of the Fair Labor Standards Act, 52 Stat. 676 (1938), as amended, 29 U.S.C. Sec. 215(b) (1952).

be given outcome-determinative effect;[58] the *Erie* precedents may furnish a helpful analogy; and above all consideration should be given to the demands of overriding federal policy.

Jury trial: In the conflict of laws the lex fori usually determines whether there shall be a jury trial,[59] and this is so even where the right to a jury trial on a particular issue is the subject of a constitutional guaranty in the foreign locus.[60] The Supreme Court has indicated, moreover, that the abolition of jury trial altogether by a state would not be a denial of due process.[61]

In theory, the outcome of a particular suit should not be materially affected depending upon whether the trier of the facts is the court or a jury; and if the outcome is materially affected it would seem to be in consequence of human factors rather than variant "legal rules."[62] Accordingly the federal district courts have almost uniformly applied federal law in determining whether to grant a jury trial.[63]

In early FELA cases, as will shortly be seen, the states were left to follow their own procedure in the matter of jury trial. The more recent cases, however, show an increasing tendency to compel the states to conduct jury trials in a manner substantially similar to the jury trials conducted in the federal district courts. The only reference to jury trial in the FELA is in Section 3,[64] which has provided since the Act was first adopted in 1908 that contributory negligence shall not bar a recovery "but that the damages shall be diminished by the jury in proportion to the amount of negligence" attributable to the employee. This statutory

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[58] The term "presumption" is being used loosely in the text. Even if one jurisdiction accepts the rule of another that the existence of B must be inferred from the proof of A in the absence of proof to the contrary, the question still remains whether the first jurisdiction will borrow from the second its rules regarding the precise burden placed by the presumption upon the non-favored party and the precise degree of aid afforded by the presumption to the favored party once the non-favored party produces rebutting evidence. See Ray, *op. cit. supra* note 46, at 591-96. While the federal district courts have tended generally to give outcome-determinative classification to "presumptions" it does not appear that they have given adequate consideration to these important subsidiary problems.

[59] RESTATEMENT, CONFLICT OF LAWS, Sec. 594 (1934).

[60] Bourestom v. Bourestom, 231 Wis. 666, 673, 285 N.W. 426, 429 (1939); Hopkins v. Kurn, 351 Mo. 41, 171 S.W. 2d 625 (1943).

[61] *Cf.* Chicago R.I. & Pac. Ry. v. Cole, 251 U.S. 54 (1919).

[62] "In essence, the intent of that decision [Erie R.R. v. Tompkins] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court." Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

[63] See Note, *State Trial Procedure and the Federal Courts: Evidence, Juries, and Directed Verdicts under the Erie Doctrine,* 66 HARV. L. REV. 1516, 1521 n. 30 (1953).

[64] 35 Stat. 66 (1908), 45 U.S.C. Sec. 53 (1952).

language has never been relied upon by the Supreme Court, nor even mentioned by it, in cases dealing with the type of jury trials afforded by the states. Since an action under the FELA is, as has been noted, essentially an action in negligence, it is the type of action for which a jury trial must be provided in the federal courts by virtue of the Seventh Amendment; thus Section 3 was not needed to guarantee a jury trial in the federal courts, and need not be viewed as designed to guarantee a jury trial in any court.

The original Act made no reference whatever to proceedings in state courts. Thereafter at least one state court declined to exercise jurisdiction in an FELA proceeding, which brought about a hasty amendment in 1910 declaring that the jurisdiction of the federal courts "shall be concurrent with that of the courts of the several states."[65] And the next year the Supreme Court held that, even before the 1910 amendment, causes of action arising under the FELA were enforcible as of right in the state courts, emphasizing in this connection "that there was not involved here any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure . . ."[66] Shortly afterward the Supreme Court held that the states were free in FELA cases to follow local procedures which permitted a jury to reach a verdict by less than a unanimous decision,[67] or which permitted a jury to be constituted with less than twelve persons.[68] To the contention that that Seventh Amendment guaranteed a unanimous verdict by a jury of twelve in controversies over federally-created rights regardless of whether such rights were asserted in federal or state tribunals, the Supreme Court replied, in *Minneapolis & St. Louis Ry. v. Bombolis*,[69] that the Seventh Amendment applied only to proceedings in the federal courts, and that insofar as the state courts adjudicated claims derived from federal law, as indeed they were bound to do when their jurisdiction was properly invoked, they were free to do so "in accordance with the modes of procedure prevailing in such courts," and that this moreover was what Congress had contemplated in enacting the FELA.[70] The apparent implication, as recognized in later cases,[71] was that the states could dispense with jury trial entirely in FELA proceedings. It was also

[65] 36 Stat. 291, 45 U.S.C. Sec. 56 (1952). The legislative history of this amendment is discussed at some length in the majority and dissenting opinions in Miles v. Illinois Central R.R., 315 U.S. 698 (1942).

[66] Second Employers' Liability Cases, 223 U.S. 1, 56 (1912).

[67] Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916); Louisville & Nashville R.R. v. Stewart, 241 U.S. 261, 263 (1916).

[68] Chesapeake & Ohio Ry. v. Carnahan, 241 U.S. 241, 242 (1916).

[69] 241 U.S. 211 (1916).

[70] 241 U.S. 211 at 218.

[71] Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952). Also see Brady v. Southern Ry., 320 U.S. 476, 479 (1943). *But cf.* Blair v. Baltimore & Ohio R.R., 323 U.S. 600, 602 (1945).

made clear in the early years of the Act that the states could follow their own practice in the matter of special verdicts.[72]

In 1943, in *Bailey v. Central Vermont Ry.*,[73] the Court had before it the question whether sufficient evidence of negligence had been adduced to warrant submission of the case to the jury in a state FELA action. This question was answered in the affirmative. But the Court also stated gratuitously as follows:[74]

> To withdraw such a question from the jury is to usurp its functions. The right to trial by jury is a "basic and fundamental feature of our system of federal jurisdiction." *Jacob v. New York City*, 315 U.S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act . . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

The *Bombolis* case and its companion cases were not cited, and there was no reference to the provision regarding jury trial in Section 3. The *Jacob* case which was cited had been tried in a federal district court, and it was a case moreover which arose under the Jones Act, which expressly provides for a jury trial.[75]

The dictum in *Bailey* was seemingly the most potent factor contributing towards the result in *Dice v. Akron, C. & Y. R.R.*[76] There it was held, in a five to four decision, that an Ohio court was not free to follow a local rule which, while leaving the issue of negligence to the jury, required the judge rather than the jury to decide whether there had been fraud in inducing the execution of a release. Justice Black, writing for the majority, quoted from *Bailey* to the effect that the right to a jury trial is "part and parcel of the remedy" created by the FELA, and, paraphrasing *Bailey*, stated that it was "too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure.' "[77] The *Bombolis* case, he said, "might be more in point"[78] had the state abolished jury trial entirely. Apart from the fact that *Bombolis* itself did not involve an attempted abolition of jury trial, it is difficult to understand the suggestion that complete abolition might succeed although the exclusion of particular issues from the consideration

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[72] *Compare* Chicago & N.W. Ry. v. Gray, 237 U.S. 399 (1915) *with* Kansas City S. Ry. v. Leslie, 238 U.S. 599, 603 (1915). *But cf.* Patton v. Baltimore & Ohio R.R., 197 F. 2d 732, 744-45 (3d Cir. 1952). As to local autonomy in the matter of the procedure to be followed when a party's requested instructions to the jury are found to be improper, see Louisville & Nashville R.R. v. Holloway, 246 U.S. 525 (1918).

[73] 319 U.S. 350 (1943).

[74] 319 U.S. 350 at 354.

[75] See note 80 *infra*.

[76] 342 U.S. 359 (1952) .The minority members concurred in the result while "dissenting" from the majority opinion. 342 U.S. at 364.

[77] *Id.* at 363.

[78] *Ibid.*

of the jury could not; and it is difficult to understand the reliance upon the dictum in *Bailey* when the Court was now aware, as seemingly it had not been in *Bailey*, that earlier decisions had gone far to establish the autonomy of the states in the matter of jury trial.

Certain FELA cases not mentioned by Justice Black constitute, it seems to the writer, stronger precedents supporting the result reached by the majority. In these cases, which for reasons of convenience are discussed in a separate section below,[79] the Court has in effect instructed the states to follow federal rules concerning certain aspects of the allocation of functions between court and jury; these cases are similar to *Dice* in that they represent federal direction of the type of jury trial the states must conduct in FELA cases. Whether the states may dispense with jury trial altogether in such cases is a question which has not arisen, and is not likely to arise, since the states customarily provide a jury trial in negligence actions. Nor has there been considered in these FELA cases the propriety as a constitutional question of federal legislative or judicial compulsion upon the states to provide a jury trial in particular instances, or, where jury trial is available under state law, to fashion the jury trial upon the federal model.[80]

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[80] The Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. Sec. 688 (1952), provides that actions thereunder shall be with "right of trial by jury." Although the Act is silent regarding possible proceedings in state courts, it was held at an early date that the state courts had the same concurrent jurisdiction as under the FELA. Engel v. Davenport, 271 U.S. 33, 37-38 (1926). The impact upon the states of the provision regarding jury trial has rarely arisen because, as in the case of the FELA, a Jones Act proceeding is based essentially upon negligence, and jury trials are accorded by the states as a matter of course.

However this aspect of the Jones Act was sharply in issue in 1947 in Hust v. Moore-McCormack Co., 180 Ore. 409, 177 P. 2d 429 (1947). The Constitution of Oregon, as construed by the Supreme Court of that state, provided that a trial court was without power to set aside a jury verdict on the ground of excessive damages, and gave the Supreme Court power, at least where error had been committed in the trial, to direct judgment for such amount as seemed to it warranted by the record. The state Supreme Court held that this constitutional provision was inapplicable in a Jones Act case. The reasoning of the Court was as follows: the provision in the Jones Act regarding jury trial contemplates a jury trial as conducted at common law; at common law only the jury could fix the amount of damages; and the right thus accorded by the Jones Act to have the jury determine the damages is too clearly "substantive" in the light chiefly of the FELA cases to be ignored by a state in favor of the local "'procedure." However the Court gave no indication that it was prepared to follow all the common law incidents of jury trial in cases arising under the Jones Act. Thus the Court expressly left open the question whether the state might abolish jury trial altogether in such cases, 180 Ore. at 419, 177 P. 2d at 434; and, more interestingly, the Court cautioned that it was "not to be understood as suggesting . . . that state law, such as we have in Oregon, prescribing that less than a unanimous jury may return a verdict or forbidding the court to comment on the evidence, may not be applied in a trial under the Jones Act." 180 Ore. 409 at 429-30, 177 P. 2d at 438. As to what was to be done in the "novel circumstances" before it, 180 Ore. at 434, 177 P. 2d at 440, the Court determined that the case

If the holding in *Dice* is that the right to a jury trial in a state court is "part and parcel" of the remedy created by the FELA solely because a jury trial would be available if the same action were brought in a federal district court, then the holding is one which invites broad applications, not only in actions in the state courts on federally-created rights generally, but also in actions in the federal district courts on state-created rights[81]—although following state jury practice in the federal district courts might present serious constitutional problems.[82] Such broad applications have not yet evidenced themselves in the inferior federal courts or in the state courts.

In fact there are substantial reasons for limiting *Dice* to FELA proceedings unless and until the Supreme Court indicates otherwise. The express reference to jury trial in Section 3 of the Act affords a convenient if not altogether convincing basis for the argument that Congress legislated regarding the kind of jury trials the states must afford in FELA cases. More persuasive however is the fact that *Dice* is essentially a skirmish in a larger battle which has sharply divided the Court over the role of the jury in FELA actions. Indeed some members of the Court have charged in effect that the role of the jury as such has not been the real issue in this struggle—the charge is that dissatisfaction over the substantive provisions of the Act, which permit recovery for accidents in this hazardous occupation only upon proof of negligence, has often caused a majority of the Court, and not always the same majority, to convert the Act into a vehicle of absolute liability by affording a maximum of leeway to juries, which are notoriously partial to maimed railroad workers and to the families of deceased railroad workers.[83] Moreover, some of the Justices who have been targets of these charges of plaintiff-mindedness have been generally unsuccessful in attempts to expand the role of the jury in other areas, but it must be observed that the cases to which reference is made antedate the major new develop-

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should be remanded to the trial court for determination whether a new trial should be granted on the ground of excessive damages, despite the fact that the state constitution denied such power to the trial court. The Court did not explore the question whether this type of reorganization of the state judicial machinery was really intended by Congress, or whether Congress could constitutionally require such a reorganization. On the other hand the assumption that the United States Supreme Court would insist that the damages be fixed by the jury found some support in the tenor of the earlier opinion in Hust v. Moore-McCormack Co., 328 U.S. 707 (1946), and of course was given strong vindication by the later decision in the *Dice* case.

[81] See the law review comments cited in note 9 *supra*.

[82] *Cf.* Herron v. Southern Pac. Co., 283 U.S. 91 (1931).

[83] *See, e.g.*, Bailey v. Central Vermont Ry., 319 U.S. 350, 358 (1943); Wilkerson v. McCarthy, 336 U.S. 53, 75-77 (1949); Stone v. New York, C. & St. L. R.R., 344 U.S. 407, 410-11 (1953). *Cf.* Urie v. Thompson, 337 U.S. 163, 196-97 (1949). Also see Note, *Supreme Court Certiorari Policy in Cases Arising under the FELA*, 69 HARV. L. REV. 1441 (1956).

ments on the FELA front.[84] Finally, two members of the five-man majority in *Dice* are no longer on the Court,[85] although the minority has also lost a member.[86] For all these reasons it is far from certain that a majority of the Court would be inclined to extend the holding of *Dice* into other areas, assuming the holding is as hypothesized above.

Allocation of functions between court and jury: The history of the jury system is also the history of judicial efforts to prevent or quash jury action thought to represent an abuse of the fact-finding function.[87] One device is to order a new trial on the ground that the verdict of the jury is unreasonable; the old jury is in effect dismissed as incompetent and the job of resolving the factual issues is assigned to a new jury. A more drastic device is to take the fact-finding function from the jury altogether by directing a verdict or by rendering a judgment notwithstanding the verdict. Some jurisdictions are more liberal than others in the scope they afford to jury action, or at least the verbal formulations of their attitudes seem more liberal. In any event it is the lex fori which determines these matters in the conflict of laws.[88] Whether the same matters are "outcome-determinative" for *Erie* purposes has been the subject of some confusion in the lower federal courts.[89]

The direction which has been taken in FELA cases has been more definite, if not less confusing. However this development can best be understood if preliminary attention is given to the distinction between decisions which are concerned with the legal consequences of particular facts and decisions which are concerned only with the methods by which the facts are established.

There is obviously a federal interest (affording a basis for overriding of state judicial action) in whether, on a given record, recovery shall be granted or denied to one claiming a federal right. Clearly this interest extends to the minimum quantum of evidence the plaintiff must adduce to prove a prime facie case; "only by a uniform rule as to the necessary amount of evidence may litigants receive similar treatment in all states."[90] And this is so even though, upon the undisputed record,

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[84] See Comment, *Federal Courts—Directed Verdicts in Civil Actions,* 47 MICH. L. REV, 974, 978 (1949).

[85] Justice Minton and the late Chief Justice Vinson.

[86] The late Justice Jackson.

[87] See Smith, *The Power of the Judge to Direct a Verdict: Section 457-a of the N.Y. Civil Practice Act,* 24 COLUM. L. REV. 111 (1924); Blume, Origin and *Development of the Directed Verdict,* 48 MICH. L. REV. 555 (1950).

[88] Morgan, *Choice of Law Governing Proof.* 58 HARV. L. REV. 153, 159 *et seq.* (1944).

[89] See Note, *op. cit. supra* note 63, at 1523-25; Comment, *Substance and Procedure under the Doctrine of Erie Railroad Co. v. Tompkins,* 30 TEXAS L. REV. 600, 604 (1952); 5 MOORE, FEDERAL PRACTICE Para. 38.10 (2d ed. 1951); Note, *Federal Trials and the Erie Doctrine,* 51 NW. U. L. Rev. 338, 347-51 (1956).

[90] Brady v. Southern Ry., 320 U.S. 476, 479 (1943). Also see Chicago, M. & St. P. Ry. v. Coogan, 271 U.S. 472 (1926); Western & Atlantic R.R. v. Hughes, 278 U.S. 231 (1929).

the trier of the facts is free to infer the existence or non-existence of negligence, for the concern here is with the minimum which the plaintiff as a matter of law is required to prove.[91] When a prima face case has been proved, but the material facts are disputed, resolution of the factual issues is again a matter of federal interest, in the sense that the interest in whether a claimed federal right is properly granted or denied can hardly be less than the interest which created the right. If the Supreme Court limits its review of factual issues in such cases it is not because a federal interest is lacking but because the Court is functioning in its appellate role, accepting in large measure the findings made by the trier of the facts in the state courts, as it accepts those made by the trier of the facts in the federal district courts, if there is a reasonable basis for the findings.[92] In its appellate role, the Supreme Court may hold that on a particular state of facts one of the parties must win or that the other party cannot win, irrespective of the findings made by the trier of the facts, or the Court may hold that the record does not support a request for such a ruling.[93] Insofar as the Court is determining that the evidence overwhelmingly compels (or does not compel) a particular result, the Court again is ruling on the legal consequences of facts and not on the method by which the facts are initially determined.

In a number of cases where state trial judges or state appellate courts gave peremptory rulings for the railroad, the Supreme Court has reversed on the ground that the jury could reasonably have found either way on the particular facts;[94] in such cases the Court has often stated that the resolution of "close or doubtful" questions is necessarily for the jury.[95] Since in these cases the Court is not holding that the record compels a determination in favor of one party or the other—since a determination either way would obviously be sustained if made in the first instance by the jury—it would seem that the Court is directing the states concerning the machinery they are to employ in resolving doubtful questions. However the cases can and perhaps should be read in a different sense—they can be taken as holdings that the Court will inter-

[91] Compare the cases cited in note 94 *infra*.

[92] *Cf.* Taylor v. Mississippi, 319 U.S. 583, 585-86 (1943); Feiner v. New York, 340 U .S. 315, 316 (1951). The statement in the text is only a rough generalization, for the approach of the Supreme Court to questions of fact often presents complex problems. See HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 539-45 (1953); ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 191 *et seq.* WOLFSON & KURLAND ED. (1951).

[93] *E.g.*, Pence v. United States, 316 U.S. 332 (1942); Galloway v. United States, 319 U.S. 372 (1943).

[94] Bailey v. Central Vermont Ry., 319 U.S. 350 (1943); Lavender v. Kurn, 327 U.S. 645 (1946); Ellis v. Union Pacific R.R. 329 U.S. 649 (1947); Wilkerson v. McCarthy, 336 U.S. 53 (1949).

[95] Bailey v. Central Vermont Ry., *supra* note 94, at 354. Also see Lavender v. Kurn, *supra* note 94, at 652-53; Wilkerson, v. McCarthy, *supra* note 94, at 61-64.

vene when the normal operation of the *existing* state judicial machinery has been distorted by a misconception concerning a federal question, such as a mistaken view that not enough evidence of negligence has been adduced, or a mistaken view that the evidence overwhelmingly compels a particular result.[96] Reading the cases in this light, what the Court is saying is that as a matter of federal law a particular state of facts is strong enough to support a determination for A *or* B, that it is not so weak from A's point of view as to compel a determination for B, and that proper enforcement of the FELA requires that the case be tried in the state courts without any misconception on this point, for otherwise the scales would be unfairly weighted against A.[97] Thus the actual holdings would seem to be not that the jury must determine a "close or doubtful" question but only that the question is in fact "close or doubtful;" once such a holding has been made the determination of the question in issue by a jury follows as a matter of course under the usual state procedure.

However some recent FELA cases concerning directed verdict practice cannot be rationalized in this manner. Preliminarily it should be noted that there are two basic approaches as to when a directed verdict (or judgment notwithstanding the verdict) should be granted. In a number of states, and this is apparently the more traditional view, the trial judge may direct a verdict upon consideration of only such evidence as is favorable to the party against whom the verdict is sought.[98] Thus if the plaintiff has proved a prima facie case, these jurisdictions will not allow a verdict to be directed against him irrespective of the weight of the evidence on the defendant's side. If the jury returns a verdict in favor of the plaintiff, the Court will now weigh all the evidence, and will set the verdict aside and order a new trial of it thinks the verdict unreasonable. In such jurisdictions disagreement between court and jury can lead to a succession of new trials.

It is the rule in a number of other jurisdictions,[99] and for a long time it appeared to be the settled federal rule,[100] that a verdict is to be directed whenever the circumstances are such that a jury verdict for the other party would necessarily have to be set aside—in other words, upon consideration of all the evidence. Under this rule successive jury trials

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[96] *Cf.* Chesapeake & Ohio Ry. v. De Atley, 241 U.S. 310, 316-18 (1916).

[97] Even when a state court denies a state-created right because of a misconception on a point of federal law, there is a basis for federal judicial intervention. *E.g.,* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924). On the other hand, there does not appear to be a federal right to have the local practice properly applied in the adjudication of federal claims, Louisville & Nashville R.R. v. Holloway, 246 U.S. 525 (1918), as long as an opportunity is in fact provided to present the federal claims.

[98] 9 WIGMORE ON EVIDENCE Sec. 2494 (3d ed. 1940). Also see Smith, *op. cit. supra* note 87, Blume, *op. cit. supra* note 87.

[99] See WIGMORE, *op. cit. supra* note 98, at Sec. 2494.

[100] Comment, *Federal Courts—Directed Verdicts in Civil Actions,* 47 MICH. L. REV. 974 (1949).

are avoided. Although the Supreme Court has applied this rule in FELA cases arising in the federal district courts[101] it does not seem in the past to have enforced the rule upon the state courts, and in general the state courts followed their own practice in the matter of directed verdicts.[102] It may be observed that, whatever may be the practical consequences, in theory the final outcome of the litigation cannot be materially affected by a procedure requiring successive jury trials, since the court is always under a duty to set aside an unreasonable verdict.[103] However in 1949, speaking for the Court in a state FELA action, Justice Black said:[104] "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." Justice Black did not cite authorities, but the Court clearly did consider only one side of the evidence in this and in a number of earlier FELA actions where the question in issue was the propriety of a directed verdict or of a judgment notwithstanding the verdict.[105]

As previously noted the Court in these and other decisions has been particularly concerned that what it considers to be "close or doubtful" cases should not be taken from the jury. Indeed the Court in these cases sometimes conveys the impression that a jury verdict supported by a reasonable quantum of evidence on one side must necessarily stand irrespective of the weight of the evidence on the other—that even submission of the issue to a new jury is precluded;[106] but such indications have never appeared in a context from which it could be said that the

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101 Pennsylvania R.R. v. Chamberlain, 288 U.S. 333 (1933).

102 *Cf.* Brenizer v. Nashville, C. & St. L. Ry., 156 Tenn. 479, 3 S.W. 2d 1053 (1928); Dutton v. Atlantic Coast Line R.R., 104 S.C. 16, 88 S.E. 263, 267 (1916), *affirmed*, 245 U.S. 637 (1918). *Compare* Louisville & Nashville R.R. v. Holloway's Adm'r, 163 Ky. 125, 173 S.W. 343 (1915), *with* Louisville & Nashville R. R. v. Grant, 234 Ky. 276, 27 S.W. 2d 980 (1930).

103 It is to be noted, however, that by law in some states the verdict rendered after a third jury trial may not be set aside for unreasonableness. See Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 179-80 (1944); 22 TEXAS L. REV. 359 (1944); Brenizer v. Nashville, C. & St. L. Ry., *supra* note 102. In some states, moreover, a statute or constitutional provision decrees that a particular issue, usually contributory negligence, *must* be submitted to the jury, and that the jury's determination on this issue is conclusive. *Cf.* Chicago, R.I. & P. Ry. v. Cole, 251 U.S. 54 (1919); Herron v. Southern Pac. Co., 283 U.S. 91 (1931). The degree to which such provisions must be followed in state FELA actions has not been determined by the Supreme Court.

104 Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949).

105 Bailey v. Central Vermont Ry., 319 U.S. 350 (1943); Lavender v. Kurn, 327 U.S. 645 (1946).

106 In Lavender v. Kurn, *supra* note 105, the fatal accident had not been witnessed by anybody. The plaintiff introduced evidence intended to show that the decedent had been struck by a hook protruding from a train, and in rebuttal the railroad introduced evidence purportedly proving that such a cause was "physically and mathematically impossible," 327 U.S. 645 at 652, and tending also

Court knowingly intended such a radical departure from the basic rule of trial procedure which requires the court to weigh *all* the evidence in passing upon the reasonableness of the jury's verdict. At most, it seems more reasonable to interpret this line of cases as making applicable, perhaps only in FELA proceedings, the practice which prohibits a directed verdict (or a judgment notwithstanding the verdict) even though a contrary jury verdict would have to be set aside—a practice which, in case of an unreasonable verdict, requires resubmission of the issues to another jury. The necessity of holding a new trial, as an alternative to peremptory disposition of the case by the judge, is of considerable practical consequence—first, because of the notorious partiality of juries for the plaintiff in FELA cases, to which reference has already been made; and second, because of the tendency of the courts to yield when successive juries persist in being "unreasonable."[107] Yet even in this area one discerns only a vague insistence by the prevailing Justices that the traditional functions of the jury shall be respected—there is little evidence of awareness of a distinct break with prior trial practice.[108] Thus, even if a new rule concerning directed verdicts seems to be emerging from the FELA cases, it is not clear at this time that it should be applied in other than FELA cases, or possibly also in cases under related statutes like the Jones Act.[109] The increasing federal control over allocation of functions between court and jury in state FELA cases is an aspect of, and finds support in, the growing tendency, discussed in the previous section, to hold generally that the states must grant a federal-type jury trial in such cases. Here as in the *Dice* situation a majority of the Justices may not be prepared for an extension of a rule developed in the course of the struggle over FELA liability. Certainly there has been no discernible expansion

to show that the decedent's death had been due to murder rather than to a railroad accident. The state Supreme Court held that on this record the case should not have been submitted to the jury. The United States Supreme Court reversed, stating that the railroad's evidence was *"irrelevant* upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. * * * Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But when, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable" (emphasis supplied). 327 U.S. at 652-53.

Also see Note, *Supreme Court Certiorari Policy in Cases Arising under the FELA,* 69 HARV. L. REV. 1441, 1447-50 (1956).

[107] See Smith, *op. cit. supra* note 87, at 122-23.

[108] See the concurring opinion of Justice Douglas in Wilkerson v. McCarthy, 336 U.S. 53, 70-71 (1949), and his dissenting opinion in Calmar Steampship Corp. v. Scott, 345 U. S. 427, 444, N. 1 (1953).

[109] The Jones Act incorporates the FELA by reference, giving seamen the same remedy that railroad workers have under the FELA. *Cf.* Garrett v. Moore-McCormack Co., 317 U.S. 239, 244 (1942); Engel v. Davenport, 271 U.S. 33 (1926).

of this rule into new areas, even in the lower federal courts.[111] And in FELA cases in the lower federal courts and in the state courts there has been, not unnaturally, much confusion.[112]

Statutes of limitations: Statutes of limitations are procedural in the conflict of laws on the theory that they represent local policies of repose which are not intended to affect the "substantive" rights of the parties.[113] In general, the forum will interpose its shorter statute of limitations to bar a cause of action which is not barred in the foreign locus, and conversely the forum, in the absence of a "borrowing" statute, will give the benefit of its longer statute of limitations to a cause of action which is barred by the shorter limitations period of the foreign locus.[114] On the other hand, federal courts adjudicating state-created rights in cases of diversity jurisdiction have been strictly enjoined to follow the statute of limitations of the forum state in order to achieve the uniformity of outcome demanded by the post-*Erie* line of cases.[115]

When federally-created rights have been asserted in the state courts, the latter, in the absence of an express federal statute of limitations, have applied the local limitations rule as a matter of course.[116] However, when

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111 See cases collected at 10 Federal Digest Cum. Supp. Trial, Key no. 178 (1955); Comment *op. cit. supra* note 100 at 983.

112 *E.g.*, Keith v. Wheeling & L.E. Ry., 160 F. 2d 654, 657-58 (6th Cir., 1947), *cert. denied*, 332 U.S. 763 (1947); Barnett v. Terminal R. Ass'n of St. L., 200 F. 2d 893, 896-97 (8th Cir. 1953), *cert. denied*, 345 U.S. 956 (1953); Keiper v. Northwestern Pac. R.R., 134 Cal. App. 2d 702, 286 P. 2d 47 (1955), *cert. denied*, 350 U.S. 948 (1956); Bowman v. Illinois Central R.R., 9 Ill. App. 2d 182, 132 N.E. 2d 558, 569 (1956); August v. Texas & N.O. R.R., 265 S.W. 2d 148, 153 (Tex. Civ. App. 1954). Also see Comment, *op. cit. supra* note 100, at 982-93.

113 *Cf.* Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

114 STUMBERG, CONFLICT OF LAWS 147,52 (2d 1951).

115 Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Guaranty Trust Co. v. York, 326 U.S. 109 (1945). An independent basis for doing so may be found in the procedural history of the Rules of Decision Act. See Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 78-81 (1955).

116 See cases cited in HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 476 (1953). Even where a statute has been construed broadly as a federal pre-emption of the area in which it is operative, the pre-emption is ordinarily not deemed to extend to local "procedural" matters, see *e.g.*, Dickenson v. Stiles, 246 U.S. 631 (1918), which ordinarily include statutes of limitations. There is a considerable reluctance to leave an area uncontrolled by any limitations period whatever, which has been largely responsible for making state statutes of limitations applicable even in the federal district courts. See Hill, *op. cit. supra* note 115, at 79-80. Conceivably, however, a federal "substantive" right claimed in a state court may be hostile to the spirit of a local limitations rule, particularly where the local rule is one of laches, since the latter may represent more a policy of estoppel than a policy of repose. *Cf.* Utley v. City of St. Petersburg, 292 U.S. 106 (1934). In some circumstances the facts which bring into existence an estoppel may clearly constitute a basis for the denial of relief on independent state grounds. *E.g.*, Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., 243 U.S. 157 (1917). In other circumstances the area in which an estoppel is claimed may be one which

Congress qualifies a federally-created right by a specific limitations period intended to be operative in all courts, it is so operative by reason of the paramountcy of federal law, and analysis in terms of whether or not it is procedural, or whether or not it is outcome-determinative, is simply irrelevant.[117] An illustration is afforded by the decision in *Engel v. Davenport*.[118]. The Jones Act,[119] under which this case arose, incorporated by reference the then two-year statute of limitations of the FELA. When, as in this instance, a statute creating a right of recovery also contains a specific limitations period, the latter is usually given substantive effect in the conflict of laws as establishing a condition precedent to recovery which cannot be evaded by resort to a state with a longer statute of limitations.[120] However some states will deny recovery even in these cases if the local statute of limitations is shorter.[121] And in California, where this Jones Act case arose, it was assumed that conflict of laws principles were applicable and that the action was barred by the one-year statute of limitations of the forum.[122] The Supreme Court reversed, holding in effect that the probable intention of Congress to ensure "uniformity of operation,"[123] a consideration of more than ordinary significance in admiralty legislation,[124] required the federal statute of limitations to be followed in the state Courts as well as in the federal courts. The paramount effect of the same federal statute of limitations in state FELA cases had been established at an earlier date.[125]

It has long been clear that whether a cause of action has been commenced within the period of limitation set forth in the FELA is ordinarily a federal question, involving the construction of the federal statute.[126] A parallel development in the *Erie* line of cases is worth noting, if only because it illustrates clearly that the policy considerations operative at the

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is pre-empted by federal law. *Cf.* MacGregor v. Westinghouse Elec. & Mfg. Co., 329 U.S. 402 (1947).

117 In holding the then two-year statute of limitations set forth in the FELA to be binding upon the state courts, Justice Holmes, writing for the Supreme Court, said: "In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure." Atlantic Coast Line R.R. v. Burnette, 239 U.S. 199, 201 (1915).

118 271 U.S. 33 (1920).

119 See note 80 *supra.*

120 GOODRICH, CONFLICT OF LAWS 243-44 (3d ed. 1949).

121 *Id.*

122 See the opinion of the State Supreme Court in 194 Cal. 344, 288 P. 710 (1924).

123 271 U.S. at 39.

124 *Cf.* Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

125 See note 117 *supra.*

126 Reading v. Koons, 271 U.S. 58 (1926); Herb v. Pitcairn, 325 U.S. 77 (1945). *But cf.* Sauerzopf v. North Amer. Cement Corp., 301 N.Y. 158, 93 N.E. 2d 617 (1950).

federal and state levels are not identical. In *Ragan v. Merchants Transfer & Warehouse Co.*,[127] the Kansas statute of limitations was concededly applicable in a diversity case instituted in the United States District Court for Kansas, and the question was whether the action had been instituted within the two-year period set forth in the Kansas statute. Rule 3 of the Federal Rules of Civil Procedure provides that a civil action is commenced by the filing of a complaint with the court, and the complaint had in fact been filed within the two-year period. However the Kansas statute provides that an action is not to be deemed commenced until the service of the summons, and in this instance the summons had been served after termination of the two-year period. The Supreme Court held that the Kansas practice should be followed, chiefly on the basis of the so-called *Erie* policy of enforcing state-created rights substantially in the same way they would be enforced in the courts of the forum state. The Court did not attempt to accommodate and apparently did not even consider the demands of the competing policy of federal procedural uniformity embodied in the Federal Rules of Civil Procedure,[128] nor did the Court examine the question whether the *Erie* rule of uniformity required extension to an area where differences between federal and state law of a procedural character could not reasonably be supposed to afford a basis for forum-shopping—an area where what had appeared for a time to be the *raison d ètre* of cases like *Guaranty Trust Co. v. York*[129] was therefore inoperative.[130] These considerations are of course not applicable at the state level, where the primary problem is to ascertain the demands of paramount federal law, and the demands of state policy are irrelevant save perhaps in the practical sense that the stronger the local policy the more it will ordinarily take to persuade the courts that federal law overrides it.

The statute of limitations is similarly involved when the plaintiff seeks to amend the complaint after the statutory period has expired. When and in what circumstances this constitutes the institution of a new action which is barred by the statute has been held to be a matter of federal law binding upon a state court in an FELA proceeding.[131]

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[127] 337 U.S. 530 (1949).

[128] See Hill, *op. cit. supra* note 115, at 95.

[129] 326 U.S. 99 (1945).

[130] *Cf.* Hart, *The Relations Between State and Federal Law*, 54 COLUM L. REV. 489, 512-13 (1954); Blume and George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 953, 955-56 (1951).

[131] Seaboard Air Line Ry. v. Renn, 241 U.S. 290 (1916). The seemingly contrary implication of Brinkmeier v. Missouri Pac. Ry., 224 U.S. 268 (1912), must be deemed overruled by the later decision in the Seaboard Air Line case.

However state courts have been upheld by the Supreme Court when they have disallowed amendments on state grounds other than statutes of limitations, as where local procedural rules designed to insure fairness and to prevent surprise have been deemed to bar such amendments. Atlantic Coast Line R.R. v. Mims, 242 U.S. 532 (1917); Nevada-Calif.-Oreg.-Ry. v. Burrus, 244 U.S. 103

Whether the federal courts are compelled in a corresponding manner to follow state "relation back" rules in diversity cases has been the subject of conflicting decisions by the lower federal courts.[132] For the reasons already stated, the problems on the state level are not identical with those on the federal level, whatever the impact of the *Ragan* case may be in this area.

Manner of raising a federal question: Although the adequacy with which a pleading in a state court asserts a federally-created right is a federal question,[133] it is usually taken for granted that the pleading must conform with the requirements of local procedure.[134] It is also clear that a state may not defeat a federal right under the guise of rules of procedure which in effect prevent an adjudication of the federal question.[135]

That these rules are easier to state than to apply is illustrated by the decision of the Court in *Brown v. Western Ry. of Alabama.*[136] The Georgia courts had sustained a demurrer to a complaint under the FELA on the ground that it did not state a cause of action. The complaint had averred that the railroad had been negligent in allowing clinkers and other debris to collect in its yards, and that the plaintiff had been injured when he stepped upon a clinker; the complaint did not allege negligence in the position of the particular clinker that caused the accident, and this omission was apparently the essential basis for the holding by the Georgia Court of Appeals.[137] The Supreme Court, by Justice Black, held that

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(1917). In the absence of federal occupation of such procedural areas it is reasonable that they should be deemed to be governed by state law.

[132] Blume and George, *op. cit. supra* note 130, at 957-59.

[133] Davis v. Wechsler, 263 U.S. 22 (1923); First Nat. Bank of Guthrie Center v. Anderson, 269 U.S. 341, 346 (1926).

[134] HART AND WECHSLER, *op. cit. supra* note 116, at 499-504. Also see note 131 *supra.*

[135] An illustrative case is Rogers v. Alabama, 192 U.S. 226 (1904), where the state court had struck from its files as "unnecessarily prolix" under local law a two-page motion by the defendant in a murder case raising the objection that the exclusion of negroes from the grand jury violated his rights under the Fourteenth Amendment. Also see New York Central R.R. v. New York & Penn Co., 271 U.S. 124 (1926); National Mut. Bldg. & Loan Ass'n v. Brahan, 193 U.S. 635 (1904); Davis v. Wechsler, *supra* note 133. Presumably the federal Constitution prevents a state from employing similar devices to bar consideration of the law of another state when that law is clearly applicable under settled principles of the conflict of laws. *Cf.* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936).

[136] 338 U.S. 294 (1949).

[137] The Georgia court also expressed the view that it was inferable from the allegations that the proximate cause of the accident was the plaintiff's own negligence, but the court showed an awareness that contributory negligence is not an absolute bar to recovery under the FELA, and it is clear from the opinion that the demurrer would have been overruled if there had been an adequate allegation of the defendant's negligence. See 77 Ga. App. 780, 49 S.E. 2d 833 (1948).

the complaint did "set forth a cause of action"[138] under the FELA, and declared:[139]

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws . . . . Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved.

The dissenting opinion of Justice Frankfurter, in which Justice Jackson concurred, took the view that the demurrer had been properly sustained for failure to follow local practice. Justice Frankfurter observed that the Georgia courts were enforcing in this case, as in all other cases, "a local requirement of pleading"[140] that reflected "something of the persnicketiness with which seventeenth century common law read a pleading,"[141] but he concluded that this did not amount to a denial or a limitation of the claimed federal right—in this connection he seemed particularly impressed by the fact that the plaintiff, on notice of the objections raised by the demurrer, had had ample opportunity under Georgia law to amend his complaint "in order to satisfy elegancies of pleading"[142] required by the local procedure. Actually Brown's failure to amend his complaint is only one of several factors which suggests that, whatever the troubles he may have encountered in the state courts, they were not due to excessively burdensome pleading rules as such.[143]

The proposition, often stated, that the sufficiency of pleadings asserting a federal right is itself a federal question would seem to suggest that the degree of particularity required under state law is simply ir-

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[138] 338 U.S. 294 at 297.

[139] *Id.* at 298-99.

[140] *Id.* at 301.

[141] *Id.* at 303.

[142] *Id.* at 301.

[143] If a "strict" pleading jurisdiction requires more particularized allegations than a "liberal" pleading jurisdiction, it does not follow that the two jurisdictions differ with respect to the minimum quantum of proof necessary to establish a prima facie case (the latter being a federal question.) Presumably it would have been easy for Brown to amend his complaint to set forth the more particularized allegations, but this would have been improvident if these allegations would have been difficult of proof *and* if as a matter of law he really did not have to adduce such proof to win. Interestingly enough, Justice Black's opinion, after reciting certain factual allegations which did appear in the complaint, stated that "the foregoing if proven would show an injury of the precise kind for which Congress has provided a recovery." 338 U.S. 294. This would suggest that the problem below was not the local pleading rules as such but rather a misconception concerning the minimum quantum of evidence needed in an FELA case, which was reflected in the local pleading rules only because the latter required highly particularized allegations. However, Justice Black's opinion is not articulated in these terms. As indicated in the text, the opinion seems to proceed from the assumption that Brown had been prejudiced by pitfalls in the local pleading procedure.

relevant—indeed it is arguable from this proposition that a pleading asserting a federal right which would be deemed adequate in a federal district court under the extremely liberal provisions of Rule 8 of the Federal Rules of Civil Procedure should be deemed an adequate assertion of the federal right in a state court. But the Supreme Court has never so held. In fact, subsequent to *Brown v. Western Ry. of Alabama* the Court upheld, as resting on an adequate state ground, the refusal by a state court to consider certain claims raised under the Fourteenth Amendment for the reason that the supporting allegation was "conclusory" under the state practice.[144] Thus the question of the adequacy of the allegations by federal standards is apparently not even reached unless there has been compliance with all reasonable pleading requirements of the states, such as the local rules regarding joinder of parties and causes of action,[145] and, presumably, a requirement that a complaint be verified. Apparently a local requirement of particularity in factual allegations is also to be followed if not "over-exacting."[146]

The qualification is a significant one, because in former years qualifications of this sort have been relatively unknown; that is to say, the Supreme Court has generally refused to consider claims of federal right in state judicial proceedings without full compliance with state procedure as long as some sort of procedure did in fact exist for raising the federal question, however burdensome or frustrating it might be[147]—a notoriously troublesome area being post-conviction procedure in criminal cases.[148] The overriding of state procedure is perhaps easier or simpler to justify in the matter of the adequacy of a pleading than in such matters as technical rules governing the type of writ or motion by which a particular

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144 Zorach v. Clauson, 343 U.S. 306, 311, n. 7 (1952). In a dissenting opinion in this case Justice Frankfurter indicated that he construed the *Brown* decision as a holding that federal claims cannot be barred because the supporting allegations run afoul of state rules forbidding conclusory pleading, 343 U.S. at 322 n. 1, but the Justice was alone on this point. *Cf.* Ellis v Dixon, 349 U.S. 458 (1955).

145 Lee v. Central of Georgia Ry., 252 U.S. 109 (1926).

146 Brown v. Western Ry. of Alabama, *supra* note 136, at 295.

147 See HART AND WECHSLER, *op. cit. supra* note 116, at 492-517. However it is uncertain that the Court would take the view today that a state is free to make an unsuccessful appeal "costly", see Louisville & Nashville R.R. v. Stewart, 241 U.S. 261, 263 (1916), when it is only by the process of appeal that federal review may be had of federal questions. In the last cited case, which was an FELA action, the Court upheld a state statute imposing a ten per cent penalty upon a party who obtains a supersedeas and then loses on appeal. The right of appeal may in many cases be illusory if the judgment cannot be stayed. On the other hand the statutory penalty in the Stewart case was apparently in lieu of interest on the judgment, see 241 U.S. at 263, and was not unreasonable in the circumstances.

148 *E.g.*, Mooney v. Holohan, 294 U.S. 103 (1935); Herndon v. Georgia, 295 U.S. 441 (1935); Marino v. Ragen, 332 U.S. 561, 563-64, 569-70 (1947) (concurring opinion).

question may be raised in the state courts. In any event there is no indication in the *Brown* case that the Court considered the possibility of rejecting what it conceives to be burdensome state procedures in these larger areas, or the implications of such a move; and in fact the *Brown* case has had no such wider impact as yet.

If the "over-exacting" pleading rules of Georgia had been applied in respect of a cause of action arising under the laws of another state, it is hardly likely that the Supreme Court would have found in the Georgia rules as thus applied a transgression against the Full Faith and Credit Clause or the Fourteenth Amendment. Apart from the theoretical difficulties posed by the latitudinarian approach in this area in the past, the feasibility and desirability of such a decision would raise questions of a somewhat different order from those involved where the issue is the effective enforcement of paramount federal law. Again, it is doubtful that the *Brown* case furnishes a helpful analogy in situations where the so-called *Erie* principle applies. If the states set seventeenth century-type pitfalls which take a substantial toll of unwary litigants, it is hardly likely that the current emphasis on uniformity of outcome requires the federal district courts sitting in those states to do likewise; and here too there is no indication that the holding of the *Brown* case has been thought to require such results.[150]

Venue and forum non conveniens: It has been held that the venue provisions in the Jones Act were intended to apply only in respect of actions in the federal courts, and that the states are free to apply their own venue requirements in cases arising under that Act.[151] Presumably this is also true of the FELA.[152] However a federal venue provision which is *intended* to be applicable in the state courts overrides any contrary state rule, at least insofar as it says there shall be no venue in a situation where state law says there shall;[153] it is far from certain that federal law many confer venue in a state litigation when there is none

[150] It is to be emphasized that "strict" and "liberal" pleading rules reflect different concepts concerning the functions the pleadings are to serve in such matters as adequacy of notice and definition of the factual issues; they do not of themselves betoken varying concepts concerning the ingredients of a cause of action or the degree of proof required to establish a prima facie case. See note 143 *supra.*

[151] Bainbridge v. Merchants & Miners Transp. Co., 287 U.S. 278 (1932).

[152] *See* Miles v. Illinois Central R.R., 315 U.S. 698, 703 (1942). *But cf.* Pope v. Atlantic Coast Line R.R., 345 U.S. 379, 380, 383 (1953).

[153] Alabama & Vicksburg Ry. v. Journey, 257 U.S. 111 (1921) (suit against federal Director General of Railroads); Davis v. Wechsler, 263 U. S. 22 (1923) (same). Similarly, while a state, in non-federal matters, may treat a special appearance to raise objections concerning venue and service as in effect a general appearance and a corresponding waiver of all the objections that are waived by a general appearance, *cf.* York v. Texas, 137 U.S. 15 (1890), it cannot in this manner defeat such defenses when they have their origin in federal law. Davis v. Wechsler, *supra* note 133; Michigan Central R.R. v. Mix, 278 U.S 492 (1929).

under state law.[154] The Supreme Court has held too that a court of state A may not enjoin a person, on grounds of inequity or hardship, from prosecuting an FELA action in a court in state B where the suit in state B was consistent with the venue provision of the FELA; whether or not the local venue law of state B was satisfied in these situations was not in issue in these cases and was not discussed by the Court.[155]

However it has also been held that a state court in which an FELA suit is brought may decline to exercise jurisdiction at the behest of a non-resident plaintiff who complains of conduct which took place outside the state,[156] and may decline on forum non conveniens grounds generally.[157] In recognizing this freedom to refuse to entertain jurisdiction in appropriate cases, the Supreme Court has emphasized that Congress has never actually ordered the state Courts to take jurisdiction in FELA cases.[158] Whether Congress may actually compel the state Courts to exercise jurisdiction is a difficult constitutional question which has never been decided, but as a practical matter it must be recognized that even without such a directive the power of the states to decline jurisdiction in such matters is exceedingly limited and probably does not exist at all in FELA cases.[159]

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[154] *Cf.* Bainbridge v. Merchants & Miners Transp. Co., *supra* note 150, at 280-81.

[155] Miles v. Illinois Central R.R., *supra* note 151; Pope v. Atlantic Coast Line R.R., *supra* note 152. These cases may be taken to mean that state A is powerless to interfere by virtue of a paramount federal policy—they cannot be taken as holdings that venue must lie in state B although unavailable under local law.

[156] Douglas v. New York, N.H. & H. R.R., 279 U.S. 377 (1929).

[157] Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1 (1950).

[158] Douglas v. New York, N.H. & H. R.R., *supra* note 156, at 388; Missouri *ex rel.* Southern Ry. v. Mayfiefild, supra note 157, at 5.

[159] Just as the states are obliged to give effect to legal rights created by other states, Hughes v. Fetter, 341 U.S. 609 (1951); First Nat. Bank of Chicago v. United Air Lines, 342 U.S. 396 (1952), so they are obliged, even without a Congressional directive, to give effect to legal rights created by federal law. Claflin v. Houseman, 93 U.S. 130, 136-37 (1876); Second Employers' Liability Cases, 223 U.S. 1, 56-59 (1912); McKnett v. St. Louis & S. F. Ry., 292 U.S. 230 (1934). The duty to do so in the case of state-created rights may be modified by considerations of local policy. The duty to give effect to federally-created rights may not be modified by considerations of local policy, Testa v. Katt, 330 U.S. 386 (1947), except—and it is difficult to think of other exceptions—a policy based not upon "the source of the law sought to be enforced," McKnett v. St. Louis & S. F. Ry. *supra,* at 234, but upon a reluctance to allow out-of-state causes of action to be tried in the local courts in the circumstances indicated in the text. The state courts, as indicated in the Second Employers' Liability Cases, *supra,* at 57, are obliged to adjudicate federal claims (and, it may be added, those created by other states) when their jurisdiction is "appropriate to the occasion." But this means their "ordinary jurisdiction," McKnett v. St. Louis & S.F. Ry., *supra* at 233, or their "general jurisdiction," Broderick v. Rosner, 294 U.S. 629, 643 (1935), which may not be the same thing as their jurisdiction as set forth by local statute—for the states may not evade their "constitutional obligation" to accept

Here again the permissible practice on the state level does not afford a helpful analogy for determining the law that should govern the federal district courts in diversity cases. Thus the federal district courts have followed the federal venue statutes as a matter of course without regard to the venue statutes of the states.[160] As for forum non conveniens, this practice has been superseded in the federal district courts by Section 1404(a) of the Judicial Code[161] which, in lieu of dismissal, provides for transfer to a more convenient forum without the type of strong showing formerly required concerning the inconvenience of the original forum.[162] The problem now is to strike an accommodation between the policy of this statute and the *Erie* policy of uniformity with the outcome in the forum state, a major subsidiary problem being whether the result is to be fashioned in the light of the probable outcome in the original or in the transferee forum.[163]

Other "procedural" areas; the Erie analogy considered further; constitutional problems: In *Dickenson v. Stiles*[164] the Court sustained the applicability in a state FELA action of a state statute giving an attorney a lien upon the cause of action, enforcible in a direct suit against the railroad. The opinion, by Justice Holmes, was to the general effect that the federal statute did not occupy this particular area—that in permitting suits in the state courts Congress must have contemplated the application of the "ordinary incidents of state procedure,"[165] of which the statute in question was one because it dealt "only with a necessary expense of recovery."[166] There may be situations, however, when state-created liens upon a federal cause of action are inconsistent with the broad purposes of the statute creating the cause of action.[167]

Another case of special interest is *Missouri ex rel. St. Louis, B. & M. Ry. v. Taylor*,[168] which arose under the Carmack Amendment, providing for suits against carriers for property loss or damage.[169] In this case the Court upheld a state assertion of jurisdiction based solely upon attach-

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jurisdiction "by the simple device of removing jurisdiction from courts otherwise competent." Hughes v. Fetter, *supra* at 611. It is probably safe to conclude that if the state courts have jurisdiction in ordinary negligence actions, or in actions for damages based upon violation of a statutory duty, they are powerless to decline jurisdiction in FELA litigation. *Cf.* McKnett v. St. Louis & S.F. Ry., *supra.*

160 See cases cited following 28 U.S.C.A. Sec. 1391 (1950).

161 28 U.S.C. 1404(a) (1952).

162 Norwood v. Kirkpatrick, 349 U.S. 29 (1955).

163 See Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955).

164 246 U.S. 631 (1918).

165 *Id.* at 633.

166 *Id.* at 632.

167 *Cf.* NLRB v. Sunshine Mining Co., 125 F. 2d 757 (9th Cir. 1942), *cert. denied*, 312 U.S. 678 (1941).

168 266 U.S. 200 (1924).

169 34 Stat. 593 (1906), as amended, 49 U.S.C. Sec. 20(11) (1952).

ment, even though jurisdiction could not have been obtained in a federal district court sitting in the same state because jurisdiction by attachment is generally unavailable in the federal district courts and because other possible bases of jurisdiction were lacking. Justice Brandeis, writing for the Court, stated: "The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the Court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum."[170] But he added that "no particularity of state procedure will be permitted to enlarge a substantive federal right,"[171] citing cases involving burden of proof,[172] presumptions,[173] and statute of limitations,[174] which is to say that certain rules which the states regard as "procedural" and which they may continue to so regard for conflict of laws purposes must be regarded as "substantive" for other purposes, for reasons which have already been pursued at some length.[175]

It is not clear whether a federal district court in a diversity situation would assume jurisdiction in a case where jurisdiction cannot be obtained under the law of the forum state.[176] However, it is apparent that in many other respects the plaintiff does pursue "whatever remedial advantage inheres in the particular forum," and this is true on the federal level as well as on the state level. Thus the plaintiff (or in many cases the defendant, through removal to a federal court) may be expected to choose the forum with the more favorable rule concerning joinder of parties and causes, election of remedies, jury or non-jury trial, and discovery procedure. As a matter of fact, the successful manoeuvering of a case onto a trial docket which is or is not congested can have obvious practical consequences, not the least of which is the effect on the prospect of settlement. If the issues involved are in a sense often issues of "judicial housekeeping,"[177] and if the outcome of the litigation is not determined with finality as it is in the case of a "door-closing" rule,[178] the fact is

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[170] 266 U.S. 200 at 208.

[171] *Id.* at 209.

[172] Central Vermont Ry. v. White, 238 U.S. 507 (1915).

[173] New Orleans & N. R.R. v. Harris, 247 U.S. 367 (1918); Yazoovv Mississippi Valley R.R., 249 U.S. 531 (1919).

[174] Atlantic Coast Line R.R. v. Burnette, 239 U.S. 199 (1915).

[175] For other collections of cases on the substance-procedure dichotomy in state FELA litigation see Annotations, 12 A.L.R. 693 (1921); 36 A.L.R. 917 (1925); 96 Lawyers' Edition 408 (1952). Also see 33 YALE L. J. 308 (1924); 2 STAN. L. REV. 594 (1950); 21 TENN. L. REV. 324 (1950); 28 TEXAS L. REV. 972 (1950); 50 COLUM. L. REV. 385 (1950); 30 CHI-KENT L. REV. 364 (1952); 37 CORNELL L. Q. 799 (1952).

[176] See, *e.g.*, Note, *Jurisdiction of Federal District Courts over Foreign Corporations,* 69 HARV. L. REV. 508, 522-24 (1956).

[177] See Note, *State Trial Procedure and the Federal Courts: Evidence, Juries and Directed Verdicts Under the Erie Doctrine,* 66 HARV. L. REV. 1516 (1953).

[178] See HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 668-78 (1953); Stewart, *The Federal "Door-Closing" Doctrine,* 11 WASH. & LEE L. REV. 154 (1954).

that as a practical matter the outcome may sometimes be affected no less by these "remedial advantages" than it is by rules governing presumption and burden of proof—and these "remedial advantages" moreover are often discernible in advance and constitute perhaps a more potent influence on forum-shopping than the influences which the Supreme Court has eliminated in the line of cases beginning with *Klaxon Co. v. Stentor Mfg. Co.*[179] Yet there is an obvious difference between, on the one hand, giving "substantive" classification to some key rules which are conveniently ascertainable and sharp in their impact on the conduct of a lawsuit, and, on the other, carrying this process to the point where the distinction between the federal and state courts is more or less obliterated. Moreover, if Congress may be presumed to have intended a uniform application of the FELA, this does not completely gainsay Justice Holmes' point that in expressly recognizing the concurrent jurisdiction of the state courts Congress must be presumed to have contemplated that the "ordinary incidents of state procedure"[180] would apply.

Finally, the constitutional problems on the federal and state levels are dissimilar. The constitutional limits if any to the supervision which the Supreme Court may exercise over the inferior federal courts are murky indeed.[181] Essentially different is the question whether the machinery of state government is being remolded for federal purposes insofar as the state courts, in the exercise of a jurisdiction which they ordinarily have no power to decline, are compelled to conduct themselves in all substantial respects as if they were federal courts down to matters of internal organization and division of functions. This question and its constitutional implications have received relatively little consideration from the Supreme Court, and it is not proposed to pursue the matter here.[182] It is suggested only that the basic postulates of our federalism may preclude federal action to draw the line between substance and procedure at exactly the same place in the two different systems of courts.

Conclusion

It is evident that insofar as the state courts give effect to federally-created rights, the Supreme Court has been enforcing, particularly in FELA cases, a new demarcation of the line between substance and procedure. In earlier opinions the customary explanation of the Court

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[179] 313 U.S. 487 (1941).

[180] See note 165 *supra*. This is apart from the fact that, since 1911, FELA actions instituted in the state courts have not been removable to a federal district court, 28 U.S.C. Sec. 1445 (1948). This provision against removal does not appear to have significantly affected the action of the Supreme Court save in the venue cases. *E.g.*, Miles v. Illinois Cent. R.R., *supra* note 152.

[181] *Compare* Weeks v. United States, 232 U.S. 383 (1914) *with* Wolf v. Colorado, 338 U.S. 25 (1949).

[182] *Cf.* Bainbridge v. Merchants & Miners Transp. Co., 287 U.S. 278, 280 (1932); Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916), and the cases cited in note 159 *supra*. *Cf.* note 80 *supra*.

was that the states had erred in giving a procedural classification to matters which were really "substantive." In more recent cases the Court has shown increasing awareness that the familiar substance-procedure dichotomy of the conflict of laws has been largely abandoned in such cases, and that the new development corresponds largely to the development that has been taking place in the federal district courts under guidance of the post-*Erie* line of cases.[183] And in general it is undoubtedly desirable that a state court should give effect to federally-created rights substantially as a federal district court would, just as it is desirable that a federal district court should give effect to state-created rights in substantially the same way as the courts of the state in which it sits—at least where the operative facts transpired within that state. Insofar as the decisions in these two areas both tend towards the same objective of uniformity of result, each area can serve as a source of precedents and analogies which may be useful for the solution of problems in the other.

On the other hand certain significant differences between the various forces and policies which are operative in the two areas bespeak the need for a cautious approach to this problem. If the *Erie* development is the more recent of the two, it is also the more consciously oriented. On the state level the Supreme Court has neither articulated nor evidenced the single-minded pursuit of a goal that is so conspicuous of the post-*Erie* cases starting with *Klaxon Co. v. Stentor Mfg. Co.*[184] At least one good reason for this is that on the state level the problem is complicated by the

[183] In Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942), where a state court was reversed for applying a local rule of burden of proof in an action arising under the Jones Act and also under the general maritime law, justice Black, writing for a unanimous Court, stated as follows:

> If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law" [citing *Erie R.R. v. Tompkins*].

This was before the landmark decision in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), but the new direction had already been charted in such cases as Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487 (1941), and Cities Service Co. v. Dunlap, 308 U.S. 208 (1939).

In Brown v. Western Ry. of Alabama, 338 U.S. 294, 301 (1949) (dissenting opinion), Justice Frankfurter was evidently prepared to apply the outcome-determinative standard of the *Erie* case generally in actions in the state courts to enforce federally-created rights; his objection was that the majority was going even further in this FELA case than the *Erie* standard contemplated. Also see the majority opinion at 338 U.S. 296.

[184] *Supra* note 183.

need to give effect to the peculiar purposes of the paramount federal interest being vindicated and to all valid manifestations of Congressional intent, which militates against a uniform classification of substance and procedure. For this reason among others there are grounds for doubting that some of the trends which have been observed in the FELA cases will be extended to other situations where state courts enforce federally-created rights.